United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-6079

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants-Appellants.

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS

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BRIEF FOR DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

This is an appeal by defendants, Sheet Metal Workers' International Association, Local Union No. 28 ("Local 28") or ("Union") and the Union Trustees of the Local 28 Joint Apprenticeship Committee ("JAC") from a decision and Order, entered July 18, 1975 (68)[1] and an Order and Judgment, entered August 29, 1975 (127). The court below (Werker, J.) held that Local 28 had discriminated against non-whites[2] in admission to the Union and to the industry apprenticeshop program administered by JAC (103), and ordered certain affirmative action to be undertaken.

It is the propriety of two specific aspects of this affirmative action which is now before this Court.

ISSUES PRESENTED

1. Whether the District Court erred in directing : (a) a quota system for admission to Union membership, (b) a preferential program for non-whites to achieve the quota, and (c) the appointment of an administrator to implement it, notwithstanding the absence of any acts of intentional discrimination by Local 28 and the strong public policy against quotas.

2. Whether the District Court erred in directing the replacement of one of the present white Union trustees on the JAC with a non-white, notwithstanding the absence of any improper actions by any of the present trustees.

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1. All references are to the Joint Appendix

2. "Non-whites" was defined for the purposes of this action as blacks and Spanish surnamed persons.

STATUTE INVOLVED

The statute involved in the proceedings below and on this appeal is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. ("Title VII"). The relevant portions of the statute, Section 703(j) (42 U.S.C. §2000e-2(j)), Section 706 (g) (42 U.S.C. §2000e-5(g)), and Section 707(a) (42 U.S.C. §2000e-6(a)), are reproduced in full in an addendum to this Brief.

STATEMENT OF THE CASE

This action was instituted by the Equal Employment Opportunity Commission ("EEOC") in 1971, pursuant to Section 707(a) of Title VII. Originally, the action was against four unions and their related apprenticeship committees in the building trades industry. Thereafter, separate trials were ordered for each union and its related co-defendants. (68-69).

The gravemen of the complaint was that defendants[3] had discriminated against non-whites by denying them admission to Local 28 because of their race and the consequent deprivation of employment opportunities attendant to the lack of membership.

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3. In addition to Local 28 and JAC, the other defendant in this proceeding is the New York City Chapter of the Sheet Metal and Air-Conditioning Contractors' International Association ("Contractors' Association"). The New York State Division of Human Rights is a third-and fourth-party defendant. In addition, the City of New York was granted leave to intervene as a party-plaintiff. (69-71).

Following trial conducted on various dates between January 13 and February 3, 1975, the district court found that Local 28 had engaged in certain practices which it concluded had a discriminating impact on non-whites:

1. Maintaining a transfer policy which had a disproportionate impact on non-whites;

2. Failing to organize non-union sheet metal shops which employed non-whites;and,

3. Administering a test for journeyman's status which had a disproportionate impact on non-whites.

The court also found that the JAC had administered a series of tests for entrance into the apprenticeship program ("JAC battery") which had a disproportionate impact on non-whites.

As a result, the court ordered that defendants take the following affirmative action:

A. Grant non-whites a preference in admission to the Union so as to achieve the quota of 29% in Local 28's membership;

B. Replace one of the Union's present white Trustees on the JAC with a non-white;

C. Administer a non-discriminatory "hands-on" journeyman test for admission into the Union;

D. Administer a non-discriminatory apprenticeship entrance examination ("JAC battery");

E. Maintain extensive records as to all aspects of Union affairs;

F. Develop recruitment practices designed to dispel the Union's reputation for discrimination in non-white communities; and

G. Advertise and promote among non-whites the availability of membership in Local 28 through the apprenticeship program and the journeyman's test. (136-145).

In addition, the court directed that an administrator be appointed with broad powers to supervise implementation of the foregoing, subject only to review by the District Court.

STATEMENT OF FACTS

Local 28 is the recognized bargaining agent for journeyman and apprentice sheet metal workers employed by sheet metal contractors within the City of New York (72).

Contractors' Association is an association of building contractors in New York City who are engaged in sheet metal construction work. At all times relevant herein, Contractors' Association and Local 28 have been parties to successive collective bargaining agreements regulating wages, hours and working conditions in the sheet metal construction industry (75).

JAC is a joint industry committee composed of three trustees appointed by Contractors' Association and three by Local 28. JAC administers the apprenticeship program in accordance with the collective bargaining agreements. This porgram has, at all times relevant herein, been registered with the United States Department of Labor, Manpower Administration, Bureau of Apprenticeship and Training and the New York State Department of Labor, Apprenticeship Council (75-76).

The requirements, including tests for admission to the apprenticeship program, were previously alleged to have a disproportionate impact on non-whites. In State Division on Human Rights v. Farrell, 43 Misc.2d 958, 252 N.Y.S. 2d 649 (Sup. Ct., N.Y.Co., 1964), the Supreme Court, New York County, by Markowitz, J., held that the existing requirements for admission to the program were improper. Justice Markowitz then prescribed the requirements to be applied in a separate opinion ("Corrected Fifth Draft") (75). These requirements included the JAC battery of tests, which, since 1966, have been prepared and conducted by Stevens Institute of Technology (75). Since 1966, JAC has administered the apprenticeship program in compliance with the Corrected Fifth Draft (75).

Traditionally, there have been four methods of obtaining membership in Local 28:

1. Successful completion of the four-year apprenticeship program;

2. Successful performance on a written and practical journeyman's test;

3. Transfer from another local union affiliated with the Sheet Metal Workers' International Association; and

4. Employment with a newly-organized sheet metal contractor who will certify as to its need for the applicant and the applicant's ability to work in accordance with journeyman standards of performance (74).

The most predominant method of admission has been through completion of the apprenticeship program. Between 1965 and 1974, of the 1103 individuals admitted to membership in Local 28, 2.81% were from newly-organized shops, 5.98% had transferred from sister unions, 9.07% had obtained admission upon passage of the journeyman's test, and 79.78% had become members of Local 28 thorugh completion of the apprenticeship program (74).

Since January, 1968, the non-white participation in the apprenticeship program has averaged over 15% (106 et. seq., Ex. 59, ¶29).

Unemployment in the sheet metal industry has been most severe since the Fall of 1973 and has become progressively more pronounced. Thus, in the period from April 30, 1974 through

October 29, 1974, a period in which employment is not generally subject to seasonal declines, the unemployment rate among journeymen members of Local 28 was 22.4% (1085-1087). Because of this increasing unemployment and the desires of Local 2[illegible] to preserve available job opportunities, the Union undertook various measures including the reduction of the traditional workday from 7 to 6 hours (1083). In addition, Local 28 continued to defer journeyman's tests (94) and limited transfers from sister unions to individuals who had previously been members of Local 28 (101).

These measures, undertaken in furtherance of legitimate and necessary trade union purposes, had the incidental but unintentional effect of retaining the non-white representation in Local 28's membership at about 4% (1075-1076).

THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS

The district court concluded that the administration of Local 28's admission procedures had the effect of discrimination against non-whites. The court did not find that Local 28 had intentionally discriminated, but rather, found only that the effect of its policies and practices had a discriminatory impact on non-whites.

Thus, in discussing the failure to administer the journeyman's test and the alternative utilization of the ID slip system to maintain work opportunities for existing members, the Court held:

> "This had the illegal effect, if not the intention, of denying non-whites access to employment opportunities in the industry." (Emphasis supplied) (97)

Similarly, in discussing the Union's actions in not organizing non-union shops employing non-whites, the court, after noting the economic reasons advanced by Local 28, made no specific findings as to the motivation, but rather, observed:

> "In any case, whatever the reason, the effect of Local 28's refusal was the denial to non-whites of the employment opportunities granted whites." (Emphasis supplied) (99).

The court also noted that restriction of transfer rights to former members of Local 28 "effectively foreclosed transfer into the Local 28 by non-whites." (101).

Examination and analysis of admission into the apprenticeship program as a means to obtain union membership consumed the greatest part of the trial and the district court's decision. This method accounted for 80% of the Union's new members as compared to 20% for the other three methods combined.

The district court opted for the opinion of plaintiffs' expert witness rather than that of JAC's expert witness, concluding that the JAC battery was not job related and had a discriminatory impact on non-whites (87). However, since the JAC battery was prepared in accordance with the Corrected Fifth Draft and the tests

were administered by an independent, impartial institution, the court did not find any intention to discriminate but found, rather, a discriminatory impact which certainly could not have been foreseen by Justice Markowitz and thereafter by JAC. The district court ordered replacement of the JAC battery with a test to be developed professionally and validated in accordance with EEOC guidelines (107).

Notwithstanding the absence of any intent to discriminate in the admissions procedures and particularly in the apprenticeship program, the district court also ordered Local 28 to grant a preference in admissions to non-whites to achieve a quota of 29% non-whites in its membership by 1981 (132). To achieve the quota, the court directed Local 28 to conduct a journeyman's examination at least annually, and the JAC to administer, at least annually, entrance examinations for the apprenticeship program. For each of these examinations, the court ordered that non-whites be given a preference. The court also ordered the appointment of an administrator to implement all of the foregoing.

The district court made no findings of any wrongdoing or impropriety of any kind whatsoever as to the six trustees of JAC or any one of them. Indeed, these trustees simply carried out the provisions of the collective bargaining agreement and Corrected Fifth Draft. It is apparent that the only error committed by the

trustees was their good faith reliance on a testing program which they had every reasonable ground to believe was lawful.

Notwithstanding the total absence of any finding of wrongdoing by any of the three union trustees or the three employer trustees, the court ordered Local 28 to replace one of its white trustees with a non-white (139).

ARGUMENT

POINT I

In View of the Strong Public Policy and Equitable Considerations Involved, This Court Should not Sanction the District Court's Imposition of a Quota System, the Non-White Preference, or the Appointment of an Administrator

The district court's directive that Local 28 grant preference in admissions to non-whites and to obtain a 29% non-white membership by 1981 clearly constitutes a quota system. Such a procedure has been consistently held to be a most extraordinary and generally improper method of achieving equal opportunity in housing, education and jobs.

In Milliken v. Bradley, 418 U.S. 717 (1974), the United States Supreme Court considered the propriety of a forced busing program encompassing several school districts to dispel the de jure segregation which existed in one of the districts.

In rejecting the proposed multi-district plan, the Court noted the basic equitable principles which require that in fairness to all parties, "the scope of the remedy is determined by the nature and extent of the constitutional violation." Id. at 744. Milliken exemplifies the strong policies in favor of striking the delicate balance of according rights to one group with a minimum of imposition on the rights of others.

Implicit in Milliken is the Court's awareness of the rights to due process of individuals not party to the proceeding whose rights are nevertheless affected by the remedial relief.

The objective of correcting violations of discrimination through utilization of a remedy which least conflicts with other well-recognized interests can be referred to as the "less restrictive alternative"[4] and has been embodied in Title VII itself. Section 703(j) of Title VII provides:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in

4. Ratner, Function of the Due Process Clause, 116 U. Penn. L. Rev. 1048 (1968)

> comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

While Local 28 does not contend herein that §703(j) constitutes an absolute prohibition on imposition of a quota system,[5] it does urge that this section incorporates the same considerations of public policy, the due process rights of non-parties, and general equitable considerations expressed in Milliken.

This Court's decision in United States v. Bethlehem Steel Corporation, 446 F.2d 652 (1971), best exemplifies the balance struck between the rights of minorities who had suffered discrimination and the rights of non-minorities who would be adversely affected by remedial relief granted to the former group. There, the employer was found to have engaged in racial discrimination in hiring, job assignments, and apprenticeship training. In fashioning a remedy for the identifiable non-white victims of the discrimination who would be perpetuated in a subserviant status because of the company's seniority and transfer provisions, this Court modified those provisions to allow freedom of mobility. However, cognizant of the rights of white employees, the Court did not permit the bumping of incumbent whites so as to accelerate the relief accorded to non-whites.

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5. Cf. dissenting opinion of Hays, J., in Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622, 634 (2nd Cir. 1974).

The relief provided in Bethlehem is properly viewed as encompassing two distinct components: a remedy for acts of past discrimination and a limited, prospective, affirmative action to insure that non-white victims of discrimination may attain their "rightful place" without unnecessary infringement on the rights of others.

The same quantum of relief that obtained in Bethlehem is equally available in the instant case without resort to the extraordinary remedy of a quota system. The court below has ordered various kinds of prospective relief to afford non-whites an equal opportunity for employment in the sheet metal industry. This is sufficient to remedy the impact of any unintentional discrimination, particularly in the apprenticeship program. The imposition of a quota system herein goes far beyond the relief necessary to afford non-whites their "rightful place."

Indeed, given the substantial unemployment in the industry and the lack of any forseeable alleviation thereof, a directive to admit members, black or white, without regard for the depressed conditions of the industry, constitutes an unwarranted dilution of the employment opportunities of existing, identifiable persons not parties hereto and is an unjustified infringement on their right to due process. United States v. Bethlehem Steel Corporation, supra. Moreover, in view of the equal opportunities for employment directed by the court, it can hardly be said that the quota

system, the non-white preference, or the appointment of an administrator are necessary or constitute "less restrictive alternatives."

Furthermore, a directive to admit non-whites in preference over whites perpetuates selection procedures based on race, substituting one favored class for another. Thus, the relief directed is as onerous and unacceptable as the ills it seeks to correct and clearly serves to demonstrate the "discrimination inherent in a quota system"[6].

The court below cites three decisions of this Court in support of the imposition of a quota: Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767 (2nd Cir.), appeal pending sub nom., Larkin v. Patterson, 45 U.S.L.W. 3069 (July 28, 1975)(No. 155); United States v. Wood, Wire & Metal Lathers International, Local 46, 471 F.2d 408 (2nd Cir.), cert denied, 412 U.S. 939 (1973); and Rios v. Enterprise Association Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974).

In the first two decisions cited, the propriety of a quota system was not, per se, before the Court. Rather, in both cases, the quota had been contained in an all-party settlement agreement.

In United States v. Wood, Wire & Metal Lathers Union, Local 46, supra at 413, the Court said:

6. Hughes v. Superior Court, 339 U.S. 460, 467 (1950).

> Having agreed to be bound by changes suggested in the report [of the Administrator], either consented to or approved by the court, Local 46 cannot now raise §2000e-2(j) as a bar to the study's implementation.

And in Patterson v. Newspaper and Mail Deliverer's Union, supra at 771-772, the Court remarked:

> Furthermore, unlike appeals from decrees of the district court entered after trial on the basis of findings and conclusions where we may modify the terms of the decree, see, e.g. United States v. Bethlehem Steel Corp., supra, we are powerless to rewrite the provisions of the settlement agreement.

In Rios, there was a showing of a long-continued, intentional, egregious racial discrimination against an identifiable group of non-white individuals. By contract, in the present matter, the court's conclusion of discrimination essentially involves non-intentional, impact discrimination resulting from adherence to proceedings under the strongest possible presumption of right accorded by the Corrected Fifth Draft and the impartial services of Stevens Institute.

In addition, impact of the discrimination on non-whites is here, at best, speculative in view of the absence of any readily identifiable individuals who should be afforded their "rightful place." See United States v. Bethlehem Steel Corporation, supra. Further, in Rios, this Court rejected the significance of substantial unemployment in balancing the equities in its review of the propriety of an imposed quota. This appears to have been

predicated, at least in part, upon the presence of intentional discrimination. Here such intentional discrimination is not present. Consequently, the Court should accord significant consideration to the severe unemployment in the sheet metal industry in determining the equitable propriety of a quota system.

In sum, the equitable considerations deemed relevant in Milliken are more persuasively with Local 28 than they were with the defendant in Rios.

On the most recent occasion that this Court has considered the propriety of a quota system, it adhered to the general principles of Milliken and balanced the equitable interests of all persons who would be affected by its implementation.

In Kirkland v. New York State Department of Correctional Services, __ F.2d __, Slip Op. 5397, Docket No. 74-2116 (2nd Cir., August 6, 1975), the defendants were found to have discriminated against non-whites in promotions through utilization of tests which had a discriminatory impact. The district court ordered, as part of the relief, that defendants:

> "continue to promote at least one Black or Hispanic employee for each three white employees promoted until the combined percentage of Black and Hispanics sergeants was equal to the combined percentage of Black and Hispanic correction officers." (p. 5400).

This Court rejected the quota portion of the order and observed (p. 5408):

> "One of the most controversial areas in our continuing search for equal employment opportunit is the use of judicially imposed employment quotas. The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." (Footnote omitted)

In briefly reviewing those cases in which this Court felt constrained to permit a quota system, the Court, quoting from its earlier decision in Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission, 490 F.2d 387 (2nd Cir. 1973), in which it approved an interim quota, reiterated the general grounds therefor (p. 398):

> "Only because no other method was available for affording appropriate relief without imparing essential city services."

This Court distinguished Kirkland from Rios and other cases in which quotas were approved (p. 5409):

> "In each of these cases [Rios, et al.], there was a clear-cut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination. In the instant case [Kirkland], there is insufficient proof of the former and substantial evidence of the latter."

In further support of its rejection of the quota system, the Court stated (p. 5410):

> "Finally, although this is not dispositive of the matter, there is no claim that defendants

> at any time acted without the utmost good faith or with intention to discriminate."

Lastly, in discussing the reverse discrimination necessarily attendant to a quota system, the Court in Kirkland held (p. 5413):

> "A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white."

It is submitted that the operative facts of the case at bar are most closely analogous to Kirkland and that for the reasons stated therein, the quota system imposed here should likewise be rejected. Here, as in Kirkland, the character of the discrimination is impact, rather than intent. Here, as in Kirkland there is an identifiable group of whites who will suffer reverse discrimination through the imposition of a quota system. The whites who will be the victims of reverse discrimination in admission to Local 28 because of the preference for unidentifiable non-whites are likewise not identifiable. Both are members of the "public at large". The present members of Local 28 are truly "a small number of readily identifiable candidates" for jobs which, "regardless of their qualifications", they may be passed over for employment opportunity solely because they are white. And as this Court has observed:

> "The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes[7]."

In view of all of the foregoing, and noting particularly that the other elements of relief ordered by the district court may be undertaken with a minimum of interference with the rights of existing union members who are not parties hereto, it would seem improvident to impose the additional element of a quota which can only serve to destroy the existing balance of conflicting rights and thereby "exacerbate rather than diminish racial attitudes".

The principles expressed in Milliken and by this Court in Kirkland, strongly suggest that the imposition of a quota system, supported by a preference for non-whites and implemented ny an administrator, is unnecessary and improper herein.

7. Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1341 (2nd Cir. 1973)

POINT II

The District Court's Unprecedented Directive That Local 28 Replace One Of Its White Trustees To the JAC With A Non-White Is Unreasonable and Improper

As part of the relief ordered by the court below, Local 28 was directed to replace one of its three white trustees to the JAC with a non-white (139), even though the trustees neither individually nor collectively were found to have engaged in any acts of misconduct.

This aspect of the relief represents a form of reverse discrimination which is entirely improper and for which there is no basis in the record.

In the proceedings below, there was never any allegation or claim that any of the trustees, at any time, ever engaged in any conduct that was improper or discriminatory. There was never any allegation or claim that the trustees engaged in any discriminatory acts in the administration of the apprenticeship program including the instruction and job placement of non-white apprentices. The court below made no findings, comments or observations relating to any improprieties by the trustees. In fact, the only aspects of the JAC program modified by the court concerned the educational requirement of a high school diploma and the JAC battery, both of which had been directed by Justice Markowitz. Further, the court below did not explain the basis or need for this black-for-white substitution of trustees.

In the absence of any contrary findings by the court below, it must be assumed that the trustees were appointed because of their familiarity with the needs of the industry and their general qualifications, including honesty and integrity. To direct the replacement of any of the trustees is tantamount to concluding that they are unqualified to implement non-discriminatory tests in the fair and impartial manner, as directed by the court. Such an inference is unfounded and unsupported by the record facts.

In essence, the instant portion of the relief is nothing less than an example of reverse discrimination for no purpose whatsoever. Selection of a new Union trustee, made solely because he is a non-white to replace a white, Union trustee is precisely the kind of discriminatory conduct that Title VII condemns.

There appears to be no reported decision of any court which directs this kind of relief - neither the court below nor plaintiffs cited such precedent. Clearly, this relief is directly contrary to the general principles expressed in Milliken and Kirkland.

Perhaps the most relevant authority in this area is this Court's decision in United States v. Bethlehem Steel Corporation, supra. There, the Court stated its disagreement

with the concept of "bumping" a white employee from a job by a black employee solely because the former was white and consequently not a member of the class affected by the discriminatory practices found.

Here, the trustees have a vested, substantial right to continuation in their position of honor and respect. Their rights are certainly no less than those of the white employees in Bethlehem. Indeed, the equities in favor of the trustees are much greater than those in favor of the white employees in Bethlehem since the trustees have not attained their status as a result of discrimination against any other person. Moreover, the non-white who would accede to the position of trustee, unlike the non-whites in Bethlehem, has no claim to the position based on past discrimination.

Most recently, in Kirkland, this Court reaffirmed its disenchantment with remedies which require "bumping" of non-minorities as a remedy for past discrimination (p. 5412):

"So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be 'bumped' from a preferred position on the eligibility list solely because of his race.[32] Unless the Fourteenth Amendment is applicable only to Blacks, this is constitutionally forbidden reverse discrimination.[33] (Original footnotes included.)

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32 Note Judge Feinberg's concern about 'bumping' expressed in U. S. v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

33 'The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color.' Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 209 (1944) (concurring opinion of Mr. Justice Murphy); Commonwealth v. Glickman, 370 F. Supp. 724, 736 (W.D. Pa. 1974)."

The applicability of the foregoing is, of course, in no way diminished by the "civil service" nature of the employment in Kirkland, as is apparent by the footnote which cites with approval this Court's decision in Bethlehem.

As there appears to be no basis in fact or justification in law for the displacement of a white, Union trustee by a non-white, this aspect of the district court's order should be stricken.

CONCLUSION

Based upon all of the foregoing, it is respectfully submitted that this Court vacate so much of the Order and Judgment of the district court that (i) directs the imposition of a quota system supported by a preference for non-whites and implemented by an Administrator; and (ii) directs that a white Union trustee to the JAC be replaced by a non-white.

Respectfully submitted,

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October 10, 1975

ADDENDUM

Statutes Involved

The following sections of Title VII are involved on this appeal:

Sec. 703(j):

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group or account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Sec. 706(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful

employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

Sec. 707(a):

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.